

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Revocation of
the License of Ritzelda Anderson
to Provide Family Child Care

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Allan W. Klein on May 28, 2003, at the Office of Administrative Hearings, 100 Washington Avenue South, Minneapolis, Minnesota. The hearing record closed with the receipt of posthearing briefs on June 17, 2003.

Marshall H. Tanick and Teresa J. Ayling, Mansfield, Tanick & Cohen, P.A., 1700 Pillsbury Center South, 220 South Sixth Street, Minneapolis, Minnesota 55402-4511, appeared on behalf of the Licensee, Ritzelda Anderson. David F. MacMillan, Assistant Ramsey County Attorney, 50 West Kellogg Boulevard, Saint Paul, Minnesota 55102-1556, appeared on behalf of the Department of Human Services ("DHS" or "the Department").

NOTICE

This Report is a recommendation, **not** a final decision. The Commissioner of Human Services will make a final decision after reviewing the administrative record, and may adopt, reject or modify these Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by the Report to file exceptions and present argument to the Commissioner. Parties should contact Kevin Goodno, Commissioner, Department of Human Services, 444 Lafayette Road, St. Paul, MN 55155 to ascertain the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve his final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law

STATEMENT OF ISSUES

Should the revocation of Licensee's family child care license, based upon her spouse's disqualification, be upheld? The Administrative Law Judge concludes that it should.

Based upon the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Licensee is a resident of Ramsey County. She provides child care at her residence in Arden Hills. Ramsey County Human Services Department (the County) is the agency primarily responsible for the oversight of Licensee, including initial licensing review and compliance checking. The Minnesota Department of Human Services (the Department) has the responsibility for final decisionmaking regarding licensing issues.

2. Licensee is married to Gary Anderson, who resides in the daycare premises. They have one child, who is nearly three years old. Gary Anderson has two other children, 12 and 14 years of age, who also live at the daycare premises.

3. Licensee initially applied for a day care license in April 2000. As part of that application, the Department conducted a background check on Gary Anderson. That background check revealed that Mr. Anderson was involved in two domestic assault incidents, one in 1989 and the other on February 3, 1994. The 1989 incident was not considered since it had occurred more than seven years prior to the application. The 1994 incident was considered a disqualifying incident under Minn. Stat. § 245A.04, subd. 3d.

4. On November 3, 2000, Mr. Anderson requested reconsideration of the disqualification.^[1] Mr. Anderson admitted that the altercation occurred, but asserted that he did not initiate the conflict. He also stated "in no way shape or form there is any excuse for domestic violence in the family environment."^[2]

5. After reviewing the reconsideration request, the County recommended that a variance be granted to the Licensee, but that Mr. Anderson's disqualification not be set aside. On December 19, 2000, the Department determined that Mr. Anderson did not pose a risk of harm to persons served in the Licensee's day care and set aside the disqualification.^[3]

6. The Department issued the Licensee a day care license in 2001. The Licensee currently provides child care for four children.^[4] She receives the first child in

her day care as early as 5:30 a.m., but not on a very frequent basis. The normal pickup time is 5:30 p.m., but day care children have stayed as late as 6:00 p.m.

7. On September 23, 2001, one of Mr. Anderson's older children was ill. Mr. Anderson and the Licensee had been arguing on and off all day. In the evening, the dispute flared up. Mr. Anderson slapped the Licensee on the side of her head, while she was holding their infant son. The Licensee dialed 911, then changed her mind and hung up.

8. As is the normal practice, the 911 dispatcher sent a police officer to the address listed for the telephone number. Officer Olson of the Ramsey County Sheriff's Office responded to the dispatch. He inquired as to what had happened and both the Licensee and Mr. Anderson described the arguments that they had been having. The Licensee mentioned that Mr. Anderson "has a drinking problem and he hits."^[5] Officer Olson asked if the Licensee had been hit and she responded that she had been slapped on the face and it "kinda hurt."^[6] Mr. Anderson confirmed that he had done so.^[7] Officer Olson arrested Mr. Anderson for domestic assault.

9. Mr. Anderson was charged with fifth degree domestic assault, fifth degree assault, and disorderly conduct, all misdemeanors, for his conduct on September 23, 2001.^[8] Mr. Anderson was convicted of disorderly conduct on January 15, 2002. Neither the September 23 incident, nor Mr. Anderson's conviction were reported to the County or the Department.

10. On October 27, 2001, the Licensee and Mr. Anderson began therapy with David Horstmann, L.P. The course of therapy consisted of ten sessions in combination of individual, family and couple sessions.^[9] The focus of the therapy was "dealing with the myriad of feelings that arise" in a "blended family."^[10]

11. On June 12, 2002, the Department placed the Licensee on conditional status. This action was taken due to two serious day care rule violations observed in the Licensee's day care. The Licensee had used an underage caregiver to supervise an infant in the day care while the Licensee took other day care children with her on an errand. In that same week, an open container of Advil was left within reach of a toddler.^[11]

12. During this time, new background studies were conducted for relicensing. The background study on Mr. Anderson revealed the January 2002 disorderly conduct conviction. The County concluded that the underlying conduct that resulted in that conviction constituted domestic assault within the meaning of Minn. Stat. § 609.2242.^[12]

13. On July 17, 2002, the County notified Mr. Anderson that he was disqualified due to the determination that he had committed an act on September 23, 2001 that meets the definition of domestic assault.^[13] At the same time, the County notified the Licensee of Mr. Anderson's disqualification.^[14]

14. On August 14, 2002, Mr. Anderson requested reconsideration of the disqualification.^[15] The County recommended that the disqualification not be set aside.

The factors relied upon by the County were Mr. Anderson's history of domestic assault, his statements tending to suggest that his wife or law enforcement were partially responsible, the presence of his children, and the current conditional status of the Licensee's day care license.^[16] On August 27, 2002, the County recommended to the Department that the Licensee's day care license be revoked. The County's reasons for the revocation recommendation were similar to those cited for upholding Mr. Anderson's disqualification.^[17]

15. On November 8, 2002, Mr. Anderson underwent a chemical dependency evaluation.^[18] He also entered into a self-awareness program (Landmark Forum). While in that program, Mr. Anderson decided that he would no longer consume alcohol. Mr. Anderson began attending AA meetings and he continues to participate in that program.^[19]

16. On December 27, 2002, Mr. Anderson was informed by the Department that his disqualification would not be set aside and no variance would be granted.^[20] Also on December 27, 2002, the Department issued an Order of Revocation to Licensee based upon Mr. Anderson's disqualification.^[21] The letter informed Licensee of her right to submit a written appeal of the revocation within ten days. Licensee submitted a timely written appeal.

17. The Department issued a Notice of and Order for Hearing on January 27, 2003, setting this matter on for hearing before an Administrative Law Judge (ALJ) of the Office of Administrative Hearings. On May 2, 2003, the Licensee filed a Motion for Summary Judgment, which was denied by Order of May 21, 2003. The hearing in this matter followed on May 28, 2003.

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Minnesota Department of Human Services have authority to consider and rule on the issues in this contested case hearing pursuant to Minn. Stat. §§ 14.50 and 245A.08.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled.

3. Minn. Stat. § 245A.04, subd. 3(a) mandates that the Commissioner conduct a background study of the individuals specified in subd. 3(c), which include "persons age 13 and over living in the household where the licensed program will be provided."

4. If the results of the background study reveal that an individual has been convicted of, admitted to, or is shown by a preponderance of the evidence to have committed certain specified crimes, "the individual shall be disqualified from any position allowing direct contact with persons receiving services from the license holder"^[22]

5. A child care provider's license shall be revoked, not renewed, or suspended if the provider, or any other person living in the day care residence has a disqualification under Minn. Stat. § 245A.04, subd. 3d.^[23]

6. It is the Commissioner's burden to demonstrate reasonable cause to believe that Licensee failed to comply fully with applicable law or rule. If the Commissioner demonstrates reasonable cause existed, then Licensee must show by a preponderance of the evidence that she fully complied with the law or rule at the time of the alleged violations.^[24]

7. The Commissioner demonstrated reasonable cause to believe that the Licensee has a person over age 13 residing at the day care premises who is disqualified from contact with day care children. Licensee failed to prove that she will be fully complying with the Minn. R. 9502.0335, subp. 6A requirement that no person with a disqualification reside at the day care premises.

8. Revocation of Licensee's child care license is appropriate because of the disqualification of Mr. Anderson from contact with day care children.

9. Under Minn. Stat. 245A.04, subd. 3b(b), the Commissioner must "give preeminent weight to the safety of each person to be served by the license holder . . . over the interests of the license holder... ." The Licensee has not demonstrated that refusing to grant a waiver to allow the Licensee to operate a day care while Mr. Anderson resides in the premises constitutes an abuse of discretion.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner affirm the revocation of Licensee's family child care license.

Dated: July 22, 2003

ALLAN W. KLEIN
Administrative Law Judge

Reported: Tape recorded, four tapes. No transcript prepared.

MEMORANDUM

At the hearing, the Licensee described the physical contact on September 23, 2001 as being inconsequential. The amount of contact she described at the hearing is inconsistent with the description that she gave the police officer who responded at the time. The ALJ finds that the contemporaneous statement given to the officer to be more credible. The Licensee also told the officer that Mr. Anderson “has a drinking problem and he hits.”^[25] The Licensee asserted that the officer misunderstood what was meant by this statement. But at the hearing, the Licensee did not provide a credible explanation of what she did mean by that statement.

The record in this matter shows that Mr. Anderson slapped the Licensee on September 23, 2001 with sufficient force to cause her pain. The Licensee was holding their infant child when Mr. Anderson struck her. Mr. Anderson’s conduct was sufficient to support a conviction for disorderly conduct. The Licensee asserts that the conviction is insufficient to support a finding that an act constituting domestic assault occurred in that incident.

Domestic assault is defined as an act committed with “an intent to cause fear” or “intentionally inflicts or attempts to inflict bodily harm” on a family member.^[26] The Licensee argues that Mr. Anderson lacked the intent to cause fear and did not inflict bodily harm on the Licensee. The Department asserts that the only intent required is Mr. Anderson’s intentional decision to slap the Licensee.

The issue of intent in domestic assault is settled law. As the Minnesota Court of Appeals put it:

“With intent to” is defined as an individual that “has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result.” Minn. Stat. § 609.02, subd. 9(4) (2000).^[27]

Mr. Anderson intended to slap the Licensee. He did so, and in doing so caused her pain. As defined in statute, “bodily harm” includes “physical pain or injury.”^[28] At the time of the incident, the Licensee stated that the slap “kinda hurt.”^[29] This is sufficient to meet the bodily harm standard for misdemeanor domestic assault. The September 23, 2001 incident constitutes the same underlying conduct as domestic assault.^[30] The September 23, 2001 incident supports a finding that Mr. Anderson is disqualified under Minn. Stat. § 245A.04, subd. 3d.

Under Minn. R. 9502.0335, subp. 6A, a child care provider’s license shall be revoked, not renewed, or suspended if the provider, or any other person living in the day care residence has a disqualification under Minn. Stat. § 245A.04, subd. 3d. Mr. Anderson and the Licensee assert that the day care can operate without Mr. Anderson having any contact with the day care children. The record in this matter does not

support that contention. Mr. Anderson has promised to remove himself from the day care premises, even to moving to a hotel room should he become ill. But the hours of the day care operation ensures that there will be overlap. Even the Licensee recognized that requiring Mr. Anderson to leave his home during day care hours was undesirable.^[31] The Licensee has not demonstrated that she will be able to prevent contact between day care children and Mr. Anderson.

The Licensee asserts that a waiver is appropriate, because Mr. Anderson is not a danger to the day care children. Mr. Anderson has participated in anger management and family counseling. He has stopped consuming alcohol. These actions are commendable. But even the opinion of the family counselor that another such incident is “extremely unlikely” was accompanied “with the caveat that [the counselor] cannot predict what will happen”^[32] The Department made the seriousness of domestic assault clear in the initial licensing process, when Mr. Anderson was first disqualified. That disqualification was set aside, in part based on his assurances that “in no way shape or form there is any excuse for domestic violence in the family environment.”^[33] Less than a year after making that statement, Mr. Anderson struck the Licensee, while she was holding their infant child. The Department is entitled to rely upon Mr. Anderson’s behavior, rather than his stated intentions, in determining the appropriate disposition of the Licensee’s appeal of this revocation.

A.W.K.

^[1] Exhibit 3. Supplemental information was filed on November 6, 2000.

^[2] *Id.*

^[3] Ex. 3.

^[4] Testimony of Licensee. The Licensee’s son is not included in this total.

^[5] Ex. 4.

^[6] *Id.*

^[7] *Id.*

^[8] Ex. 4.

^[9] Ex. 19.

^[10] *Id.*

^[11] Ex. 5. At the hearing, the Licensee disputed whether the container was open. The time for appealing that issue was when the license was made conditional.

^[12] Ex. 6.

^[13] Ex. 8.

^[14] Ex. 9.

^[15] Ex. 10.

^[16] Ex. 11.

^[17] Ex. 12.

^[18] Ex. 15.

^[19] Testimony of Mr. Anderson, Ex. 21.

^[20] Ex. 16.

- [21] Ex. 17.
- [22] Minn. Stat. § 245A.04, subd. 3d(a).
- [23] Minn. R. 9502.0335, subp. 6.
- [24] Minn. Stat. § 245A.08, subd. 3(a).
- [25] Ex. 4.
- [26] Minn. Stat. § 609.2242, subd. 1.
- [27] ***State of Minnesota v. Maznio***, C8-01-276 (Minn.App.November 27, 2001).
- [28] Minn. Stat. § 609.02, subd. 7.
- [29] Ex. 4.
- [30] A review of caselaw suggests that cases charged as domestic assaults are being plea-bargained to disorderly conduct in a conscious effort to avoid collateral consequences. See, e.g. ***State of Minnesota v. Moore***, C9-99-558 (Minn.App. September 21, 1999). The disqualification statute includes the underlying facts of an incident as an independent basis for a disqualification regardless of any criminal proceeding.
- [31] Testimony of Licensee.
- [32] Testimony of David Horstmann, L.P.
- [33] Ex. 3.